No. 96-592

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

---

SPEAR, LEEDS & KELLOGG,
*Petitioner,*

v.

CENTRAL LIFE ASSURANCE COMPANY, ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA, INC., and CANADA LIFE ASSURANCE CO.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## PETITIONER'S REPLY MEMORANDUM

---

HOWARD SCHIFFMAN
(Counsel of Record)
WOODY N. PETERSON
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700
*Attorneys for Petitioner*
*Spear, Leeds & Kellogg*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

---

No. 96-592

---

SPEAR, LEEDS & KELLOGG,

*Petitioner,*

v.

CENTRAL LIFE ASSURANCE COMPANY, ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA, INC., and CANADA LIFE ASSURANCE CO.,

*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## PETITIONER'S REPLY MEMORANDUM

---

Respondents' own argument—that the court of appeals majority simply applied traditional principles favoring arbitration of disputes—supports issuance of the Writ. The Second Circuit majority's interpretation of this Court's Federal Arbitration Act ("FAA") precedents renders the "presumption of arbitrability" championed by Respondents essentially irrebuttable, and thus virtually without limit in application. Rather than being restricted to situations where there is "doubt" about the arbitrability of a dispute, the "presumption" as so interpreted would compel mandatory NYSE arbitration in every case where a claimant artfully pleads a claim of injury—however

indirect and farfetched—allegedly caused by some "business activity" of an NYSE member.

Indeed, Respondents go so far as to assert that this Court's precedents require arbitration "upon demand" (Br. Opp. at 15), and preclude any look behind the face of the pleading as "impermissibly delving into the legal merits" (*id.* at 10).[1] This Court should make clear that there is no such unbridled license to subject NYSE members to arbitration.[2]

What this Court's FAA jurisprudence does preclude is the court of appeals majority's unwarranted expansion of the arbitrability presumption. (*See* Pet. at 10-13.) When the parties did not intend a class of disputes to be within the scope of an arbitration clause, a court cannot use any such presumption to override that intention. (*See id.* at 10.) Therefore, consideration of the insurers' lack of any relationship whatsoever with Spear, Leeds—not to mention the absence of a business link that would have justified invoking NYSE arbitration—is not an improper review of the merits of the underlying dispute, but rather the only way to determine—as a court must—whether the

---

[1] Respondents stress the fact that Spear, Leeds "does not directly dispute the correctness" of the Second Circuit's holdings that the NYSE Constitution and Rules constitute an arbitration agreement requiring an NYSE member to arbitrate disputes that fall within its scope. (Br. Opp. at 10-11.) This emphasis misses the point. Spear, Leeds has never disavowed its obligation to arbitrate a dispute covered by the NYSE's arbitration provisions. The question presented by the Petition is instead whether, under the FAA and the Securities Exchange Act of 1934 ("Exchange Act"), those provisions compel arbitration of disputes with strangers, arising from the conduct of a member's customer in his private life outside his investment relationship with the NYSE member.

[2] There is no "irony" in Petitioner's resisting arbitration here, as Respondents suggest (Br. Opp. at 12). It is plain that Respondents' claim would not withstand a motion to dismiss if filed in court, and that the reason they seek arbitration is that they hope to benefit from the less rigorous legal standards applied by lay arbitrators.

insurers' concocted claim falls within the scope of the NYSE arbitration clause.[3] *See Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 115 S. Ct. 1920 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 (1987); *Wheat, First Securities, Inc. v. Green*, 993 F.2d 814, 818 (11th Cir. 1993).

The FAA "intent of the parties" inquiry and the goals of exchange regulation under the Exchange Act place limits on the presumption of arbitrability. (*See* Pet. at 7-13.) The panel majority below cut this presumption loose from these statutory moorings, thereby exposing exchange members to arbitration claims from "an indeterminate class." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931). Granting the Petition will allow this Court to decide whether the "extreme reach of the standard" adopted by the Second Circuit here will ultimately result in more harm than good in the multi-trillion dollar securities industry, disserve the goals of the Exchange Act, and improperly "extend to new frontiers the 'hazards' " of doing business in the securities industry. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 215-16 n. 33 (1976) (quoting *Ultramares*); *see also* Pet. at 8 & n.8.

---

[3] As the Petition shows, the court of appeals' summary conclusion that the mere fact that the NYSE had fined and censured Spear, Leeds provided the necessary NYSE connection was unfounded. For the same reason, there is no foundation for Respondents' suggestion that exchange "self-regulation" is furthered by NYSE arbitration here (Br. Opp. at 11). The Second Circuit majority and Respondents overlook the fact that the "legality of SLK's business activities" (*id.*) with respect to its subaccount investors, the issue investigated by the NYSE, is not implicated by the insurers' claim that Goodman defrauded them. (*See* Pet. at 9 & n.9.)

Moreover, Respondents' Brief nowhere explains how compelling NYSE members to arbitrate claims of non-member strangers over life insurance issued to a member's customer, who traded only in non-NYSE commodities futures, furthers the goals of either the FAA or the Exchange Act.

## CONCLUSION

For these reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HOWARD SCHIFFMAN
(Counsel of Record)
WOODY N. PETERSON
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700
*Attorneys for Petitioner*
*Spear, Leeds & Kellogg*

November 1996